No. 12,397

IN THE

United States Court of Appeals
For the Ninth Circuit

LAWRENCE DU VERNEY and SAMUEL N. LEWIS (alias Cecil Lewis),
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of the United States District Court for the Northern District of California, convicting the defendants, after a jury trial, of a violation of the Harrison Narcotic Act (26 U.S.C. 2553 and 2557), of a violation of the Jones-Miller Act (21 U.S.C. 174) and of a violation of the Conspiracy Statute (18 U.S.C. 371).

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. 1291.

STATEMENT OF THE CASE.

The appellants were indicted in the United States District Court for the Northern District of California in an indictment in three counts, the first count charging a violation of the Harrison Narcotic Act, the second count charging a violation of the Jones-Miller Act, and the third count charging a conspiracy to violate these Acts. After a trial by jury the appellants were found guilty on all counts. The appellant Lawrence Du Verney was sentenced to imprisonment for a period of fifteen (15) years and to pay a fine of Two Thousand Dollars ($2,000), the said sentence being imposed as follows: Imprisonment for a period of five (5) years on the first count of the indictment, imprisonment for a period of ten (10) years and a fine of Two Thousand Dollars ($2,000) on the second count of the indictment, imprisonment for a period of five (5) years on the third count of the indictment, terms of imprisonment on the first and second counts of the indictment to run consecutively, and the term of imprisonment on the third count of the indictment to run concurrently with the terms of imprisonment on the first and second counts of the indictment (Tr. 42-43). The appellant Samuel N. Lewis, also known as Cecil Lewis, was sentenced to imprisonment for a period of five (5) years and to pay a fine of Five Hundred Dollars ($500), the said sentence being imposed as follows: Imprisonment for a period of five (5) years on the first count of the indictment, imprisonment for a period of five (5) years and to pay a fine of Five Hundred Dollars ($500) on the second count

of the indictment, and imprisonment for a period of five (5) years on the third count of the indictment, terms of imprisonment to run concurrently (Tr. 43).

The three counts of the indictment, of which appellants stand convicted, read as follows:

"FIRST COUNT: (Harrison Narcotic Act, 26 U.S.C. 2553 and 2557)

The Grand Jury charges: THAT
LAWRENCE DU VERNEY, and
CECIL LEWIS,

(whose full and true names are, and the full and true name of each of whom is, other than hereinabove stated, to said Grand Jury unknown, hereinafter called 'said defendants'), on or about the 3rd day of August, 1949, in the City and County of San Francisco, State and Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one envelope containing a total of approximately 110 grains of heroin.

SECOND COUNT: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges: THAT

At the time and place mentioned in the first count of this indictment, within said Division and District, said defendants fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quan-

tity particularly described as one envelope containing a total of approximately 110 grains of heroin, and the said heroin had been imported into the United States of America, contrary to law as said defendants then and there knew.

THIRD COUNT: (Conspiracy, 18 U.S.C. 371)

The Grand Jury further charges: THAT

The said defendants, at a time and place to said Grand Jury unknown, did feloniously conspire together and with other persons whose names are to said Grand Jury unknown, to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, heroin, in violation of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of a derivative and preparation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendants then and there well knew, in violation of Section 174 of Title 21 United States Code; that thereafter and during the existence of said conspiracy one or both of said defendants, hereinafter mentioned by name, in the City and County of San Francisco, State and Northern District of California, did the following acts in furtherance thereof and to effect the objects of the conspiracy aforesaid:

(1) On August 3, 1949, the defendant LAWRENCE DU VERNEY drove Federal Narcotic Agents Elmore P. Gross and James Mulgannon in a 1949 Cadillac Sedan, License No. Cal. 25 A 9390, from the vicinity of 920 Van Ness Avenue to the vicinity of the Edison Hotel, 1540 Ellis Street.

(2) On August 3, 1949, in the Edison Hotel, at 1540 Ellis Street, the said defendant CECIL LEWIS handed one envelope containing a total of approximately 110 grains of heroin to the said Federal Narcotic Agent Elmore P. Gross." (Tr. 1-4.)

THE HARRISON NARCOTIC ACT.

The Harrison Narcotic Act, under which the appellants are charged in the first count of the indictment, reads in pertinent portion as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax." (26 U.S.C. 2553 (a)).

THE JONES-MILLER ACT.

The Jones-Miller Act, under which the appellants are charged in the second count of the indictment, reads in pertinent portion as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United

States or any territory under its control or jurisdiction contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (21 U.S.C. 174.)

THE CONSPIRACY STATUTE.

The Conspiracy Statute, under which the appellants are charged in the third count of the indictment, reads in pertinent portion as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy", each shall be punished as provided by law.

FACTS OF THE CASE.

The undisputed facts are, briefly, as follows:

The appellant, Lewis, was introduced at the Hotel Edison, 1540 Ellis Street, San Francisco, California, where he was working as a bartender, by an informer to an undercover operative, Federal Narcotic Agent Elmore P. Gross (Tr. 68, 229). A dinner party was arranged for the evening of August 2, 1949, at the restaurant in the Hotel Edison, at which time Lewis was to introduce the appellant, Du Verney, to Agent Gross (Tr. 70, 233). On the evening of August 2, 1949, at the dinner party, in which another undercover operative, Federal Narcotic Agent James Mulgannon, was present, Lewis introduced agent Gross to Du Verney (Tr. 72, 150, 233). During the dinner, agent Gross and Du Verney left the table and had a conversation at the nearby bar adjacent to the dining room (Tr. 72, 150, 262). After dinner and between 10:00 and 10:45 P.M., agents Gross, Mulgannon and the informer left the hotel together (Tr. 163, 235). Early next morning at about 1:30 A.M., agent Gross, while at his residence at 920 Van Ness Avenue in San Francisco, had a telephone conversation with Du Verney (Tr. 77, 152). Shortly thereafter and between 1:45 and 2:00 A.M., Du Verney, accompanied by a young woman, drove his Cadillac automobile to the vicinity of 920 Van Ness Avenue, where agents Gross and Mulgannon, at Du Verney's invitation, entered the said automobile (Tr. 152, 265). Subsequently, after letting the young woman out of the car, Du Verney drove with agents Gross and Mulgannon to the immediate vicinity of the Hotel

Edison, and while enroute had a conversation with the agents (Tr. 80, 155, 156, 266, 267). Du Verney then left the Cadillac automobile, returning in approximately 45 minutes, where he had another conversation with the agents (Tr. 81, 157, 267-268). Thereupon agents Gross and Mulgannon entered the lobby of the Hotel Edison where agent Gross met Lewis and had a conversation with him (Tr. 82-83, 158, 237-238). Lewis then handed a package containing heroin to agent Gross, who, in turn, gave Lewis $225.00 (Tr. 83-84, 237-238). A warrant was issued on August 5 for Du Verney (Tr. 196), who left for Honolulu on August 6, some 7 or 8 days sooner than he had originally planned to leave (Tr. 286-287).

The disputed facts in this case are, briefly, as follows:

Agent Gross testified that he met Lewis but once prior to the dinner party (Tr. 68, 71); Lewis, corroborated by defense witness, Lawrence Mitchell Carter (Tr. 210), testified that there had been several such meetings (Tr. 231). Agent Gross testified that during the conversation at the bar, Du Verney agreed to sell him some narcotics and asked him for his 'phone number (Tr. 73); Du Verney testified that although narcotics were mentioned by Gross the discussion was primarily about gambling and girls and agent Gross gave him his 'phone number (Tr. 262). Agent Gross, corroborated by agent Mulgannon (Tr. 155-156), testified that in Du Verney's automobile, after the young woman had alighted, Du Verney agreed to sell the narcotics for $225.00 (Tr. 80-81); Du Verney denied

that he agreed to sell Gross narcotics but stated that the conversation was about his getting a girl for Gross (Tr. 266-267). Agent Gross, corroborated by agent Mulgannon (Tr. 156-157), testified that when Du Verney stopped his automobile in front of the Hotel Edison he left the car, entered the Hotel Edison, stayed there for a while, came out of the hotel and told agent Gross to go into the hotel and his man would take care of him (Tr. 80-81); Du Verney testified that he had not entered the hotel when he alighted from his Cadillac in front of the Hotel Edison, but entered the automobile of some friends who happened by, driving away with them, returning later to get into his car and letting agents Gross and Mulgannon out of his car, stating that he could not get any girls and that they owed him nothing (Tr. 267-269). Agent Gross, corroborated by agent Mulgannon (Tr. 308), testified that from the time the dinner party broke up at the Hotel Edison until the time of the meeting with Du Verney in front of 920 Van Ness Avenue, the informer was continuously with him and agent Mulgannon (Tr. 304-305); Lewis testified that not more than one hour after the dinner party broke up and the informer left the Hotel Edison with Agents Gross and Mulgannon, the informer returned to the hotel, gave him the package containing the narcotics, the contents of which were to him unknown, told him to give the package to agent Gross, that he inferred from the conversation of agent Gross that he should give the $225.00 which agent Gross had given him to the informer, and that a few days later he gave the money to the informer, none of

which he received for himself (Tr. 234-239). Agent Thomas E. McGuire of the Federal Bureau of Narcotics, corroborated in substance by agent Gross (Tr. 92), in testimony received in evidence against Lewis alone, stated that after his arrest, Lewis admitted that Du Verney had returned to the hotel after the dinner party and instructed him to give the narcotics to agent Gross and to get in return $225.00 from agent Gross, that he had given the narcotics to agent Gross, and that thereafter and around 4:00 o'clock in the morning he gave $200.00 of the money which he had received from Agent Gross to Du Verney and kept $25.00 for himself as his part of the transaction (Tr. 188-189).

It is, therefore, obvious that counsel for appellants has made a glaring mis-statement of the record in their opening brief, at pages 3 and 4, when he asserts as an undisputed fact that "Les", who in reality is a Government informer, but who counsel for appellants insists on calling an agent, left the package of narcotics with Lewis, directed him to give the package to agent Gross, who would call for it, and that Lewis gave the $225.00 which he had received from agent Gross to the said "Les".

CONTENTIONS OF APPELLANTS.

Appellants, in fourteen specifications of error, set forth in their opening brief, contend in substance that their convictions on all counts should be reversed on the following grounds:

I. The alleged erroneous instructions of the trial court in its charge to the jury (Specs. No. 1-7);

II. The alleged misconduct of the prosecution in questioning the appellants while on the stand (Spec. No. 1);

III. The alleged erroneous rulings of the trial court in admitting certain evidence and rejecting other evidence (Specs. 9-10);

IV. The alleged insufficiency of the evidence, and the alleged entrapment of the appellants (Specs. 11-14).

"SPECIFICATIONS OF ERROR."

These "fourteen specifications of error", in the language of counsel for appellants, are, as set out in the Topical Index of the opening brief, as follows:

1. "The Court erred in singling out the testimony of the defendants for close scrutiny";

2. "The Court erred when it instructed the jury that their task was ended if they were convinced of the truth of the testimony of the Government's witnesses";

3. "The Court erred in its instruction as to how the presumption that the witness was telling the truth could be negatived";

4. "The Court erred in its instructions with reference to an alleged informer";

5. "The Court erred in its instructions on entrapment";

6. "The Court erred in refusing defendants requested instruction on entrapment";

7. "The Court erred in refusing defendants requested instruction";

8. "The Court erred in permitting the prosecuting attorney, over objection, to cross-examine the defendant Du Verney as to other crimes";

9. "The Court erroneously allowed the witness for the Government to testify as to conversations out of the presence of the defendant Du Verney over objection of counsel";

10. "The Court erroneously sustained objections to questions propounded by the defendants";

11. "The evidence established entrapment to bar prosecution of the defendant, Samuel Neely Lewis";

12. "Insufficiency of the evidence to sustain the conviction of the defendant Lewis";

13. "Insufficiency to sustain the conviction of the defendant Lawrence Du Verney";

14. "Evidence established entrapment to bar prosecution of the defendant Lawrence Du Verney."

CONTENTIONS OF APPELLEE.

I. The trial court committed no error, prejudicial or otherwise, in charging the jury;

II. The prosecution acted properly in inquiring, on cross-examination, into the criminal record and background of the appellant, Du Verney, and the trial court acted properly in admitting this evidence and in its instructions to the jury in this regard;

III. The trial court correctly held certain evidence to be admissible and certain other evidence to be inadmissible;

IV. The evidence overwhelmingly supports the verdict of the jury and negates the defense of entrapment as a matter of law;

V. There is no reversible error in the record, assuming, arguendo, that there is any error at all.

ARGUMENT.

"*In an effort to spell out reversible error, the appellants have indulged in microscopic criticisms of the record below.*" (Italics supplied.)

Frederick v. United States (C.C.A. 9), 163 F. (2d) 536, 551.

These words are particularly appropriate in our case at bar, as is the following significant pronouncement which this Honorable Court made in the case of *Sue Hoo Chee v. United States,* 163 F. (2d) 551, at page 553:

> "We are moved to add that if it may be assumed that jurors are so unreliably fallible as appellant's argument indicates, then the jury system is little better than trial by ordeal. However, long application of the system has convinced legal philosophers and ordinary and great judges that twelve persons of average intelligence are not easily led from the substantial evidence of a case. When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human each exposes his own

particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes."

I.

THE TRIAL COURT COMMITTED NO ERROR, PREJUDICIAL OR OTHERWISE, IN CHARGING THE JURY.

In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.

In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, when he deems it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting on the evidence, by drawing their attention to the particulars which he thinks are important. He may even express his opinion on the facts providing he makes it clear to the jury that all matters are submitted to them for their ultimate determination.

Cuercin v. United States, 289 U.S. 466, 469;
Frederick v. United States, supra.

The appellants in their opening brief make seven assignments of error against the instructions which the trial Court gave in its charge to the jury. These complaints in substance are, that the trial Court erroneously singled out the testimony of the appellants for close scrutiny, gave unfair standards by which the

credibility of the appellants could be determined, erred in holding that the jury could convict if it believed the testimony of the Government witnesses, further erred in instructing the jury on the law of aiding and abetting, on the defense of entrapment, and on certain questions with relation to the alleged informer. On the basis of these complaints, appellants contend that the trial Court committed reversible error in its charge to the jury. That these complaints have no individual or collective merit will soon be clearly seen, although before discussing them, appellants believe it fitting to call attention to these words of this Honorable Court, in the case of *Stein v. United States,* 166 F. (2d) 851, at page 855:

> "It is claimed the Court erred in the giving of certain instructions and the refusal to give certain instructions requested by appellants. Some of the objections appear to be extremely technical and other objections are directed to a particular instruction isolated from the charge as given by the Court. We think the proper approach is to view the charge as a whole to determine whether or not the jury was properly and adequately instructed as to the law governing the case. We have followed that procedure here and careful consideration of the entire charge convinces us that the instructions given constituted a full, complete and adequate presentation of the law of the case to the jury."

Viewing the instructions as a whole (Tr. 316-334), it is obvious that the trial Court's charge to the jury was eminently fair and in accordance with the correct

rules of law, as were, as above indicated, the individual instructions.

In analyzing the individual complaints directed against the Court's instructions, attention is called to this pertinent portion of Rule 30 of the Federal Rules of Criminal Procedure:

> "* * * . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.",

as well as to this pronouncement of the Supreme Court of the United States, as set forth in the case of *United States v. Atkinson,* 297 U.S. 157, at page 159:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. *Beaver v. Taylor,* 93 U.S. 46; *Allis v. United States,* 155 U.S. 117, 122, 123; *United States v. United States Fidelity & Guaranty Co.,* 236 U.S. 512, 529; *Guerini Stone Co. v. Carlin Construction Co.,* 248 U.S. 334, 348; *Pennsylvania R. Co. v. Minds,* 250 U.S. 368, 375; *Burns v. United States,* 274 U.S. 328, 336; see *Shannon v. Shaffer Oil & Refining Co.,* 51 F. (2d) 878, 880."

In calling attention to this foregoing rule, and pronouncement of the Supreme Court, appellee in nowise

concedes that any instruction of the trial Court was erroneous.

It is to be noted that since the appellants filed their opening brief, and on March 1, 1950, the trial Court, on motion of counsel for the appellee and over the objection of counsel for the appellants, after hearing and pursuant to Rule 39 (b) of the Federal Rules of Criminal Procedure and Rule 75 (h) of the Federal Rules of Civil Procedure, corrected a portion of the reporter's transcript and certified the same to this Honorable Court. Originally the reporter's transcript reflected, as counsel for the appellants set it forth, on page 4, lines 19 through 26 of their opening brief, that the trial Court had said the following in its charge to the jury:

> "You should consider in weighing the testimony of witness, the circumstance under which the witness testified, the demeanor of the witness on the stand, the intelligence of the witness, the relation to which the witness bears to the government or to the defendant. The manner in which the witness may be affected by your verdict, *and the extent to which the witness has counterfeited or conspired, shall be put to the side.*" (Italics supplied.)

The corrected language of this instruction, now certified to this Honorable Court, reads as follows:

> "You should consider, in weighing the testimony of witnesses, the circumstances under which the witness testified, the demeanor of the witness on the stand, the intelligence of the witness, the relation which the witness bears to the govern-

> ment or to the defendant, the manner in which the witness may be affected by your verdict, *and the extent to which the witness has been contradicted or corroborated by other testimony."* (Italics supplied.) (Tr. 319, lines 13, 19, as corrected.)

It might also be noted that the reporter's transcript was also corrected to show the words "evidence as" in lieu of the word "evidences" (Tr. 319, line 5, as corrected). While this latter correction is of little moment, the former correction obviously clarifies an apparent confusion.

Appellee and appellants are in sharp disagreement as to which, if any, of the instructions of the trial Court warrant serious consideration. Appellee respectfully submits that the only instruction meriting a searching discussion is that instruction to which the appellants took exception during the trial, in which instruction the trial Court charged the jury that the presumption that a witness is telling the truth may be negatived, among other things, by evidence of his criminal record (Tr. 319, supra). Counsel for the appellants, however, attempts to set the issue at rest by merely asserting, in their opening brief, at page 9, that "the testimony of a witness can be impeached by evidence of previous crime only if the same was a felony". Counsel for appellants, however, fails to support this statement by a single authority, blithely bypassing the issue by further asserting that the "authorities are too numerous to be cited". Appellee will develop this issue at some length later in this argument, awaiting with interest to learn whether counsel

for the appellants, in their closing brief, will cite some of the "numerous" authorities to which he alludes.

It should be observed that the appellants now vigorously protest an instruction given by the trial Court that the presumption that a witness is telling the truth may also be negatived, among other things, by evidence as to his character or reputation (Tr. 319, supra). Inasmuch as the appellants took no exception to this instruction during the trial, they are in no position, in view of the authorities hereinabove cited, to complain before this Honorable Court. As a matter of fact, there was no evidence of character or reputation in the record, unless the unsavory picture which Du Verney painted of himself may be considered as such. This particular matter, too, will be discussed later in this argument, but only very briefly, because of the fact, as above indicated, that no exception was taken to this instruction at the time it was given. It is also worthy of mention that the trial Court did not limit this instruction to the appellants but directed it to any witness that may have testified. Accordingly the appellants, whose testimony was obviously designed to blacken the character and reputation of the Government officers, although without success, can not in any way consider themselves prejudiced by this instruction which they now so strenuously attack.

Equally without merit is the attack made by appellants against the other instructions which appellants, as above indicated, have assigned as error.

Attention is now called to pages 5 and 6 of appellants' opening brief where, by an incomplete quotation from the trial Court's charge to the jury, they attempt to show that their testimony was unfairly singled out for close scrutiny. It is the omitted language which gives the true picture (Tr. 331, lines 2-4, 8-10). Accordingly, the instruction under attack is now set out in full with the aforesaid omissions italicized:

> "Ladies and gentlemen of the jury, your task then is comparatively simple. I mean by that not that the case is a simple case or not a serious case or not an important case, because it is all of those things. I mean that the issue of fact as to the guilt or innocence of these particular defendants in this particular case is one that depends upon the weight which you attach to the testimony of the witnesses who testified in this case. On the one side the government presented the testimony of officers of the law engaged in the enforcement of particular statutes involved here; then on the other side, the testimony of the two defendants in this case. If you are convinced beyond a reasonable doubt of the correctness and truth of the testimony of the government's witnesses, your task is ended; you can find the defendants and each of them guilty, if that is the case. *If you are not convinced by the testimony of the government is truthful in this case, then you have a right to acquit the defendants.*
>
> So it is a matter of your determining the credibility of the witnesses for the government as against the defendants' testimony; resolving that issue of fact, you may apply the various stand-

> ards that I have given. *Be sure to weigh the testimony of the witnesses, for that is precisely, simply stated, your task in this case.*" (Tr. 330, line 13-331, line 10.)

How anyone, after reading the aforesaid instruction in its entirety, can say that the Court was unfair to appellants, is beyond comprehension, particularly in view of the fact that the Court in its charge had also stated that the "function of the jury is to decide whatever question of fact is involved". (Tr. 316, lines 11-12.)

Appellants also contend that, in giving the following instruction, the trial Court was unfair to them and partial to the Government:

> "Both defendants have testified in their own behalf in this case. That being so, you will determine their credibility according to the same standards that apply to the other witnesses. I have given you some of those standards. In this connection you may consider the interest each of the defendants has in this case. Each of his hopes and fears and what each has to gain or lose as a result of your verdict." (Tr. 321, lines 10-16.)

A similar instruction was given approval by this Honorable Court, in *Mullaney v. United States,* 82 F. (2d) 638, 643.

As a matter of fact, having told the members of the jury that they were the ultimate judges of the facts of the case, the trial Court, had it so desired, could properly have commented on the glaring weaknesses of

portions of appellants' testimony, in accordance with the prevailing rule laid down in

Little v. United States (C.C.A. 8), 276 Fed. 915, 916, and cases cited therein.

See also,

Rucker v. Wheeler, 127 U.S. 85, 93.

That the trial Court did not do so is of little moment to the appellants, who have persisted, to paraphrase the words of the Supreme Court, in *Glasser v. United States,* supra, at page 83, in magnifying, on appeal, matters which were of little importance in their setting.

The appellants, continuing their fruitless endeavor to read error into the record where none may be found, also complain about the trial Court's instruction on aiding and abetting, even though such instruction is in the language of the statute, 18 U.S.C.A. 2(a), and, in almost identical language as that instruction approved by the Supreme Court, in

Nye and Nissen v. United States, 336 U.S. 613, 618, 619, affirming the decision of this Honorable Court reported in 168 F. (2d) 846.

Another example of appellants' tendency to ignore settled law is their attack on the trial Court's instruction on the alleged defense of entrapment. The trial Court instructed the jury as follows:

"* * * . There is no issue before the jury, no evidence to support any claim of so-called entrapment of the defendants on the part of the officers of the law. There are cases in which it is proper

> for a jury to consider whether or not a person committed an offense only because he was entrapped into doing so by some officer of the law. Such an issue is not before the jury in this case. A plea of that nature, that is, of entrapment by an officer of the law only arises in a case where the defendant admits and does not deny the commission of the offense, and offers as an avoidance or excuse that he was enticed or entrapped into the commission of the offense by some officer of the law.
>
> In this case the defendants have each denied the commission of the offense. Having denied the commission of the offense, there is no issue of any entrapment involved and the whole question for the jury to decide in this case is the guilt or innocence of the defendants, or each of the defendants, upon the basis of the evidence offered on behalf of the government and the evidence offered on behalf of the defendants as to the commission of the offense as charged in the three counts of the indictment." (Tr. 332-333.)

The appellants contend that the defense of entrapment is not necessarily reserved for those who knowingly admit the commission of crime. The authorities, however, are clearly to the contrary, as will be seen, for example, by reference to the case of

> *Silk and Meek v. United States* (C.C.A. 8), 16 F. (2d) 568.

In this case, both appellants requested the Court to charge the jury on the law of entrapment and the Court refused. It appeared from the facts of the case that Meek admitted the commission of the crimes con-

tained in the several counts of the indictment of which he was convicted, but testified that he was induced and lured into the commission of these crimes. Silk, on the other hand, denied all of the charges against him. In reversing the conviction of Meek and in affirming the conviction of Silk, the Appellate Court said, at pages 570 and 571:

> "* * * . The evidence therefore presented a question of fact for the jury upon the issue of entrapment as to the defendant Meek, which should have been submitted under proper instructions. Cermak v. U. S. (C.C.A. 6) 4 F. (2d) 99.
>
> Silk denied all of the charges against him, and denied the testimony of the agents Bernard and Beazell with reference to him, except that he admitted being introduced to them by Meek. Both Meek and Silk denied the sale alleged in count 7. On this count, Meek was found not guilty, and Silk was found guilty. There was no entrapment of the defendant Silk."

The appellants complain that, since the Court found as a matter of law that no issue of entrapment was involved, it should not have instructed the jury on this subject. Bearing in mind that counsel for the appellants in his opening statement to the jury asserted that he would prove a case of entrapment (Tr. 198), this contention is so patently illogical that it calls for no reply by appellee herein. Here it should be stated that appellee will discuss the subject of entrapment in a later phase of this argument, with particular reference to the leading case of

Sorrells v. United States, 287 U.S. 435.

Another example of the fallacious reasoning indulged in by the appellants may be found in the exception which they also take to the trial Court's instructions with relation to the informer, even though this instruction is almost identical to an instruction on the same subject, cited with approval by the Supreme Court, in the case of

Vogel v. Gruaz, 110 U.S. 311, 316.

See also

In re Quarles and Butler, Petitioners, 158 U.S. 532.

Appellants, however, insist that the trial Court should have instructed the jury that an unfavorable inference must be drawn against the Government because of its failure to produce the informer. Since there was no issue of entrapment involved, any testimony which might have been elicited that the informer induced the sale of the narcotics, is immaterial. Furthermore, the Government did not have to call the informer to the witness stand to have him deny that he gave the package of narcotics to Lewis, as Lewis claimed, since it is the undisputed rule that no unfavorable inference is to be drawn against the party litigant for his failure to produce a witness who would merely corroborate what another witness has already testifed to under oath. It is obvious that the testimony of the informer would have been cumulative since, if the testimony of the Government agents was believed, the informer could not possibly have been with Lewis at the time Lewis asserted the informer gave him the narcotics in question.

In this connection see

Sher v. United States, 305 U.S. 251, 254.

It may be that appellee has failed to answer all of the "microscopic criticisms" that appellants have directed against the instructions of the trial Court to the satisfaction of the appellants. Be that as it may, in view of what has been shown herein, appellee respectfully submits that the trial Court committed no error, prejudicial or otherwise, in charging the jury.

II.

THE PROSECUTION ACTED PROPERLY IN INQUIRING, ON CROSS-EXAMINATION, INTO THE CRIMINAL RECORD AND BACKGROUND OF THE APPELLANT, DU VERNEY, AND THE TRIAL COURT ACTED PROPERLY IN ADMITTING THIS EVIDENCE AND IN ITS INSTRUCTIONS TO THE JURY IN THIS REGARD.

1. The criminal record—impeachment.

Questions relating to the admissibility of evidence in criminal cases in Federal Courts are not determined by the statutes and decisions of the several states in which the Federal Courts are sitting, but are based upon the common laws which existed in the United States prior to 1789, and the amendments thereto made by Congress or judicial decisions of the Supreme Court of the United States.

It has long been a settled rule in federal courts that a defendant who takes the stand in his own behalf may be cross-examined concerning a former conviction for the purpose of impeaching his credibility.

Such questions occasionally differ in form but it was early held that inquiry as to incarceration in a penal institution was equivalent to inquiry as to the conviction of a crime.

In *Lang v. United States,* (C.C.A.-7), 133 F. 201, the Court was called upon to determine certain questions relating to the admissibility of evidence in a certain criminal case, and in particular as to the proper scope of cross-examination of a defendant as to incarceration in a penal institution. The Court at page 204, said:

> "Questions relating to the admissibility of evidence in criminal prosecutions, based on violations of the Statutes of the United States, are questions wholly within the general rules and law applicable to the conduct of trials, and not at all subject, except as state statutes or decisions may be persuasive, to the statutes or decisions prevailing in the particular state where the court happens to sit; otherwise each state would have a substantial part in determining the manner in which the courts of the United States should enforce, not the law of the state, but the national laws.
>
> Chief Justice Cooley, in Clemens v. Conrad, 19 Mich. 170, laid down the rule covering the cross-examinations of witnesses in relation to their conviction and incarceration for crime, as follows:
>
> > 'The right to inquire of a witness on cross-examination whether he has not been indicted and convicted of a criminal offense, we regard as settled in this state by the case of Wilbur v.

Flood, 16 Mich. 40 (93 Am. Dec. 203). It is true that in that case the question was, whether the witness had been confined in state prison; not whether he had been convicted; but confinement in a state prison pre-supposes a conviction by authority of law, and to justify the one inquiry and not the other would only be to uphold a technical and at the same time point out an easy mode of evading it without in the least obviating the reasons on which it rests. We think the reason for requiring record evidence of conviction has very little application to a case where the party convicted is himself upon the stand and is questioned concerning it, with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight, that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent. We prefer the early English rule on this subject. Priddle's Case, Leach, C. L. 382; King v. Edwards, 4 T.R. 440; and for the reasons which were stated in Wilbur v. Flood.'

The rule thus stated is reenforced by Thompson on Trials, Section 458; Greenleaf on Evidence (16th Ed.) 461; Notes to Taylor's Evidence, Vol. 3, p. 978 and the cases there cited, and many other cases at hand. We are content to adopt this rule."

The rule stated in the foregoing case is that which has been universally followed by the Federal Courts for many years.

In *United States v. Reid,* 12 Howard, 361; 13 L. Ed. 1023, the Supreme Court held that admissibility of evidence in criminal cases was not determined by statutes and decisions of state courts, but by the common law as it existed prior to 1789, the decisions of the Supreme Court and Acts of Congress, and since that decision no deviation has been made from such rule. Appellee does not believe that there can be any dispute relative to such rule of law and consequently will not discuss at length the several other cases cited in this brief on the proposition.

It has likewise long been a rule in the Federal Court that a defendant who takes the stand may be cross-examined concerning a former conviction for the purpose of impeaching his credibility. *Lang v. United States, supra; Merrill v. United States* (CCA-9), 6 F. (2d) 120; *Williams v. United States* (CCA-8), 3 F. (2d) 129; *Walker v. United States* (CCA-4), 104 F. (2d) 465; *Nutter v. United States* (CCA-4), 289 F. 484. The appellants admit this rule of law in their brief but argue that such prior conviction must be for a felony. In certain Federal Courts the rule has been that the impeaching questions may relate not only to convictions for felonies, but also for infamous crimes or crimes involving moral turpitude. In fact, several Federal Courts while differing somewhat in latitude in permitting such questions, nevertheless

hold that it is even permissible to ask a defendant on cross-examination concerning the commission of any crime, whatever the grade. This seems to be the rule in this circuit.

In *Merrill v. United States,* supra, this Honorable Court considered this question at great length, citing some twenty cases relating to the propriety of questions involving previous convictions, and finally held that such questions might be asked concerning any crime, including misdemeanors. In that case, the defendant had been asked concerning a misdemeanor for which he had been convicted some thirteen years previously and the Court there held that the admission of such question and answer was proper.

In *Glover v. United States* (CCA-8), 147 F. 426, the Court held that such a question might relate to any felony or "petit larceny".

In *Neal v. United States* (CCA-8), 1 F. (2d) 637, the Court after discussing this question at some length held that such a question might be asked concerning any crime "regardless of grade".

In *United States v. Liddy,* 2 F. (2d) 60; *Parks v. United States,* 297 F. 834; *Jones v. United States,* 296 F. 632, and *Krashowitz v. United States,* 282 F. 599, it was held that questions involving previous convictions for violations of the liquor laws, both state and federal, which had been construed as misdemeanors, might properly be admitted in evidence by cross-examination of the defendant.

In *Murray v. United States,* 288 F. 1008, the Court said, at page 1014:

> "Error is alleged because the government was permitted, under defendant's objection and exception, to inquire in cross-examination of defendant if he had not been convicted of some five misdemeanors, one in the year 1908, two in 1909, and two in 1911, all of which defendant admitted, but said he had not been in any trouble since 1911. Section 1067 of the District Code provides:
>
> > 'No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime * * * but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde. * * *'
>
> It is argued that this statute—
>
> > 'does no more, and was not meant to do more, than to remove the common law disability which attached to witnesses generally who had been convicted of felonies.'
>
> It is unnecessary to enter upon a review of the numerous cited authorities, which are not altogether in harmony, but sufficient to say that there is no ambiguity in the section, and the defendant, having become a witness in his own behalf, comes within its provisions. The fact of former convictions of crime were properly shown to affect his credit.
>
> The claim that the word 'crime' as used in the section, refers to felonies only, does not impress us, because, had Congress so intended, it were

> easy to so state, and also because the word 'crime' as commonly understood, includes both felonies and misdemeanors. Bouvier's Law Dictionary, vol. 1, p. 729; Standard Dictionary; 16 Corpus Juris, p. 51; Callan v. Wilson, 127 U.S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223;".

In *Callan v. Wilson,* 127 U.S. 540, 32 L. Ed. 223, the Supreme Court was required to construe the meaning of the word "crimes" as used in the Constitution of the United States. This case involved an appeal from a judgment refusing upon writ of habeas corpus to discharge the appellant from the custody of the appellee as Marshal of the District of Columbia. An Information had been filed by the United States in the police court of the district in which the defendant was charged with the crime of conspiracy. Trial was had by the Court without a jury and the defendant was found guilty, sentenced to pay a fine of $25.00, in default of which he was to suffer imprisonment in the jail for thirty days. The defendant-appellant contended that by virtue of the third article of the Constitution of the United States providing that "the trial of all crimes except in proceedings of impeachment, shall be by jury", the Fifth Amendment to the Constitution which provides that no person "shall be deprived of life, liberty or property without due process of law", and the Sixth Amendment to the Constitution which provides "that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the state and district in which the crime shall have been committed",

he was tried contrary to the Constitution, inasmuch as he was denied the right to a trial by jury. The contention was that the meaning of the word "crime" included all criminal offenses even though they were merely misdemeanors, whereas the Government contended that a misdemeanor was not included within the meaning of the term "crime" or "criminal prosecution". The Court in a rather lengthy dissertation on this subject, in reversing the conviction, said, at page 549:

> "The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime', in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which re-

lates to trial by jury. There is no necessary conflict between them."

In *United States v. Waldon* (CCA-7), 114 F. (2d) 983, 984, 985, the Appellate Court said:

> "It is urged by appellant that his credibility could not be impeached by his confession or proof of other crimes unless those crimes were felonies, and that inasmuch as felonies are not punishable by imprisonment in a penal farm, and there was no other evidence to prove that he had been convicted of a felony, it was therefore error for the court to admit his service of the penal farm sentence. This seems to be the law in Illinois (see Bartholomew v. People, 104 Ill. 601, 44 Am. Rep. 97), and some other jurisdictions, including a few federal courts. Other jurisdictions have held otherwise. See Annotation, 6 A.L.R. 1643. This question does not appear to have been passed upon in this circuit. It seems to us fair to hold that the conviction inquired about must reasonably tend to prove a lack of character with respect to his credibility as a witness. If the former conviction shows such lack of character, we see no reason why it should not be admitted for what it is worth to counteract the presumption of credibility with which the law clothes him. That we are not bound by the decisions of the state courts in this respect cannot well be questioned. United States v. Reid, 12 How. 361, 53 U.S. 361, 13 L. Ed. 1023."

As a matter of fact, the appellants in their opening brief have cited two cases which support the position which appellee asserts.

In *Coulston v. United States,* 51 F. (2d) 178, 182, the United States Court of Appeals for the Tenth Circuit said:

> "* * *. In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible. Middleton v. United States (CCA-8) 49 F. (2d) 538; Glover v. United States (CCA-8) 147 F. 426, 8 Ann. Cas. 1184; Williams v. United States (CCA-5) 46 F. (2d) 731; Pittman v. United States (CCA-8) 42 F. (2d) 793; Lawrence v. United States (CCA-8) 18 F. (2d) 407; Haussener v. United States (CCA-8) 4 F. (2d) 884; Williams v. United States (CCA-8) 3 F. (2d) 129, 41 A.L.R. 328; Neal v. United States (CCA-8) 1 F. (2d) 637; Scaffidi v. United States (CCA-1) 37 F. (2d) 203. * * *."

In *Smith v. United States,* 10 F. (2d) 786, 788, this Honorable Court declared:

> "To impeach his testimony he might properly have been asked whether he had been *convicted of a crime,* and, if he denied that he had been convicted, it would have been permissible to produce the record in rebuttal." (Italics supplied.)

In view of the foregoing, the conclusion is inevitable that the prior narcotic violations of which Du Verney admittedly stood convicted in the State Court of California, infamous and degrading crimes, could properly be considered by the jury as impeaching his credibility, even though those violations for which Du Verney was sentenced to the county jail become, by vir-

tue of such sentences under California Law, misdemeanors rather than felonies.[1]

As a matter of fact, the prosecution, although it did not do so, could properly have brought out on cross-examination of the appellant, Lewis, the fact that he had been convicted of manslaughter (Tr. 23), an offense which likewise became a misdemeanor because of his sentence to the county jail rather than to the penitentiary.

Accordingly, the Court correctly instructed the jury, as heretofore indicated, that the presumption that a witness speaks the truth may be negatived, among other things, by evidence of his criminal record (Tr. 318-319).

2. The criminal background—entrapment.

In his opening statement to the jury counsel for the appellants began in this way:

> "The defendants, Lawrence Du Verney and Cecil Lewis, intend to show as their defense in this matter a case of entrapment." (Tr. 198.)

In the case of *Sorrells v. United States,* supra, at page 451, the Supreme Court of the United States said:

---

[1]"A felony is a crime which is punishable with death or by imprisonment in the State prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the State prison, is also punishable by fine or imprisonment in a County jail, in the discretion of the Court, *it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the State prison,* * * *." (Italics supplied.) (Section 17, *California Penal Code.*)

> "* * * if the defendant seeks acquittal by reason of entrapment he can not complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue."

Although the evidence ultimately disclosed that there was no issue of entrapment to submit to the jury, as the trial Court correctly found, the fact that counsel for appellants stated in his opening statement that he intended to show entrapment as a defense permitted the prosecution to inquire, as it did, into the criminal background of Du Verney to show his predisposition to commit the crimes for which he was being tried. That the evidence adduced on cross-examination from the lips of the appellant Du Verney showed a predisposition to commit the crimes for which he was on trial, can not be disputed; that there was no issue of entrapment to go to the jury can likewise not be disputed for reasons hereinabove and hereinafter set forth.

3. The cross-examination—its scope.

The appellants complain because the prosecution, on cross-examination, made a searching inquiry into Du Verney's background. That this inquiry was justified for the purpose of impeaching his credibility and negating the alleged defense of entrapment has already been shown. That this inquiry was also justified on the ground that Du Verney, by his testimony on direct examination, and his inconsistent and gratuitous statements on cross-examination, invited it, may also be seen by reference to the record. In *Raffel*

v. United States, 271 U.S. 494, 497, Mr. Justice Stone said of a defendant:

> "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing."

See also

Brown v. Walker, 161 U.S. 591, 597;
Fitzpatrick v. United States, 178 U.S. 304, 315;
United States v. Gates (C.C.A. 2), 176 F. (2d) 78, 80.

In the concurring opinion, in *Diggs, et al., v. United States* (C.C.A. 9), 220 Fed. 545, 563, 564, this language, in *State v. Wentworth,* 65 Me. 234, 243, 20 Am. Rep. 688, is cited with approval:

> "If he (defendant) discloses part, he must disclose the whole in relation to the subject-matter about which he has answered in part. * * * Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-incriminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth."

See, also, *Wigmore on Evidence,* Volume 4, Section 2276, Subdivisions 2, d, also cited with approval in the concurring opinion in *Diggs v. United States,* supra, at page 563.

On direct examination, in response to this question of his counsel,

> "When you say 'stuff', Mr. Du Verney, what are you referring to?"

Du Verney replied,

> "Well, 'stuff' in the underworld means any kind of narcotics, when you say 'stuff'." (Tr. 269, lines 14-17).

The prosecution, on cross-examination, was, therefore, within its rights in asking Du Verney, who had volunteered his knowledge concerning narcotics, this question:

> "You don't know anything about narcotics, do you?" (Tr. 272, lines 22-23).

In his usual, characteristic way, Du Verney volunteered this unsolicited opinion:

> "I am not, not an expert." (Tr. 272, line 24).

Du Verney having first shown a familiarity with narcotics and thereafter proceeding to volunteer the gratuitous remark that he was not an expert in the matter of narcotics, the prosecution properly proceeded to show that he actually was such an expert, by proving his prior convictions under the State Narcotic Statute. Certainly these contradictions negated the presumption that he was speaking the truth.

See *Taylor v. United States* (C.C.A. 8), 19 F. (2d) 813, 817.

Similarly, Du Verney, under cross-examination on more than one occasion, volunteered the boastful information that everyone in the Fillmore District knew him (Tr. 284, 296), and thereafter, under further question, persisted in his repeated boasts in this regard (Tr. 297, 299). Du Verney, therefore, is in no position to complain because the prosecution asked him whether, included among those whom he claimed to know, were the Police and the Federal Bureau of Investigation (Tr. 299). Du Verney is likewise in no position to complain that, after he volunteered the information that he had a police record, the prosecution elicited the further fact that it was a long record (Tr. 299). What Du Verney did, in effect, by his boasting was to place his reputation in evidence. Having done so, the prosecution properly proceeded to impeach Du Verney's credibility by contradictory statements from his own lips. In a measure this is what occurred in the case of *Sue Hoo Chee v. United* States, supra, wherein the Court said, at pages 552 and 553:

> "The gambling house question is unmeritorious. A witness to appellant's good character was under cross-examination and he was asked as to his knowledge or belief that a part of the premises testified by appellant as used for a soda fountain was also used for gambling. The question was not allowed. Thereafter, while appellant was under cross-examination the United States Attorney put the question: 'Isn't it a fact, Mr. Chee, that you also operated that establishment as a gambling establishment?' Defense counsel ob-

> jected upon the ground that the United States Attorney was trying to prejudice the appellant before the jury. The objection being overruled appellant answered that for a time during the preceding year he had taken a percentage on card gambling.
>
> The cross-examination was legitimate; it corrected appellant's evidence as to the use the premises had been put and went to appellant's credibility."

During the trial, counsel for the appellants in his seeming eagerness to prove that the conversation between Du Verney and Agent Gross concerned girls and not narcotics, only succeeded in bringing out, on his cross-examination of Agent Gross through questions that the prosecution, of course, was not permitted to ask him, that not only was Du Verney a narcotic peddler, but that he was a vicious panderer as well (Tr. 115, 126).

Du Verney also, without success, attacked the integrity of the Government agents and law enforcement officials, when, on direct examination, he futilely attempted to smear the character of Agent Gross (Tr. 263-265), and when, on cross-examination, he unfairly inferred that he was the victim of a frame-up (Tr. 295).

From all of this, it is clearly apparent that the cross-examination of the appellant Du Verney did not exceed its proper scope, and that, accordingly, he can not in justice complain against the instruction of

the trial Court that the presumption that a witness tells the truth may be negatived, among other things, not only by evidence of his criminal record, but by evidence of his character and reputation as well (Tr. 319).

To summarize, the prosecution acted properly in inquiring, on cross-examination, into the criminal record and background of the appellant Du Verney, and the trial Court acted properly in admitting this evidence in its instructions to the jury in this regard.

III.

THE TRIAL COURT CORRECTLY HELD CERTAIN EVIDENCE TO BE ADMISSIBLE AND CERTAIN OTHER EVIDENCE TO BE INADMISSIBLE.

Without merit, then, as has already been seen, is the contention of the appellants that the trial Court erroneously admitted into evidence certain testimony concerning the criminal record and background of Du Verney. Equally without merit is the further contention of appellants that the trial Court erred in holding that certain statements made by Lewis prior to the termination of the criminal design, and outside the presence of Du Verney, was binding on Du Verney. The particular conversation to which appellants take exception is that in which Agent Gross testified that he met Lewis, that he told Lewis that he wanted to meet Du Verney, whom he considered as a "big connection" for his business, which Lewis obviously

believed was the narcotic business, and that Lewis agreed to arrange a dinner party at which he would arrange to have Du Verney present so that Gross might meet Du Verney (Tr. 69-72). The trial Court reserved its ruling on the admissibility of such conversation as against Du Verney until the prosecution made another motion in this regard. Subsequently, and after Agent Gross had testified that Lewis introduced him at the dinner party to Du Verney and that Du Verney made arrangements to sell him narcotics (Tr. 72-74), the trial Court, on the renewed motion of the prosecution, held that the aforesaid conversation between Lewis and Agent Gross could also be considered as against Du Verney (Tr. 74). This action of the trial Court was in accordance with the prevailing rules of law. It is fundamental that where the existence of a criminal conspiracy has been shown, every act, statement or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act, statement or declaration of all the conspirators and is evidence against each of them. It is also fundamental that when two or more persons are associated for the same illegal purpose, any act, statement or declaration of one of them in reference to the common design and forming a part of the *res gestae,* is binding against all of them even where the indictment does not charge a conspiracy.

These rules of law find their sanction in countless authorities, among which is the case of *Cossack v.*

United States, 82 F. (2d) 214, wherein this Honorable Court stated, at page 216:

> "When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while the same is in progress are binding on the others. It is not the name by which such a combination is known that matters, but whether such persons are working together to accomplish a common result. '* * * The legal principle governing in cases where several are connected in an unlawful enterprise is that every act or declaration of one of those concerned in the furtherance of the original enterprise and with reference to common object is, in contemplation of law, the act or declaration of all. * * *' 16 C.J. § 1283, p. 646.
>
> The common object of persons associated for illegal purposes forms part of the res gestae, and acts done with reference to such object are admissible, though no conspiracy is charged. Vilson v. U. S., supra; Sprinkle v. U. S. (C.C.A.) 141 F. 811."

See, also, *Gooch v. United States* (C.C.A. 10), 82 F. (2d) 534, 537, and cases cited therein.

Finally, the contention of appellants—that the trial Court erred in holding that certain alleged conversations between Lawrence Mitchell Carter, a defense witness, and the informer, outside the presence of the Government agents, were inadmissible as being immaterial and hearsay—is so unfounded in law or in

logic as to call for no further comment by appellee herein.

Accordingly, the trial Court, as above indicated, correctly held certain evidence to be admissible and certain other evidence to be inadmissible.

IV.

THE EVIDENCE OVERWHELMINGLY SUPPORTS THE VERDICT OF THE JURY AND NEGATES THE DEFENSE OF ENTRAPMENT AS A MATTER OF LAW.

It is the accepted rule that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it. *Glasser v. United States,* 315 U.S. 60, 80.

In *Craig v. United States,* 81 F. (2d) 816, 827, certiorari denied, 298 U.S. 637, this Honorable Court said:

> "* * *. To sustain a conviction, we need not be convinced *beyond reasonable doubt* that the defendant is guilty: It is sufficient if there is in the record substantial evidence to sustain the verdict.
>
> In Felder v. United States (C.C.A. 2) 9 F. (2d) 872, 875, certiorari denied, 270 U.S. 648, 46 S. Ct. 348, 70 L. Ed. 779, the court said:
>
> 'That we cannot investigate it (the testimony) to pass on the weight of the evidence is a point too often decided to need citation; nor can we, after investigation, use such doubts as may assail us to disturb the verdict of the jury. *That reasonable doubt which often pre-*

> *vents conviction must be the jury's doubt, and not that of any court, either original or appellate.* (Cases cited.) Our duty is but to declare whether the jury had the right to pass on what evidence there was.' (Italics our own.)
>
> The correct rule was thus tersely phrased in Humes v. United States, 170 U.S. 210, 212, 213, 18 S. Ct. 602, 603, 42 L. Ed. 1011:
>
> > 'The alleged fact that the verdict was against the weight of evidence we are precluded from considering, if there was any evidence proper to go to thejury in support of the verdict (Cases cited.)'
>
> See, also, 17 C.J. 264-269."

That there is substantial evidence to sustain the conviction of Du Verney on all counts of the indictment may be clearly seen by reference to the testimony of Agent Gross, corroborated in part by the testimony of Agent Mulgannon. That there is substantial evidence to sustain the conviction of Lewis on all counts of the indictment may be seen by similar reference to the testimony of these same agents, as well as by reference to the testimony of Agent McGuire. These agents, in addition to the Government chemist, Dr. R. F. Love, whose undisputed testimony that the package in question contained heroin (Tr. 61), were the only witnesses called by the prosecution. The defense consisted of the testimony of the appellants which squarely contradicted the Government agents, together with the immaterial testimony of Carter. The jury being the exclusive

judges of the credibility of witnesses had the right, as it did, to believe the Government witnesses and to reject the testimony of the appellants.

In *Dimmick v. United States* (C.C.A. 9), 135 Fed. 257, 262, a case cited with approval in *Craig v. United States,* supra, this Court said:

> "It is not within the province of this court to interfere with the verdict of the jury upon this ground. The rule is well settled that the credibility of witnesses and the probative force of facts introduced in evidence are the sole province of the jury;"

According to the testimony of the agents, which the jury believed, Du Verney made arrangements to sell the narcotics, set the price, drove the agents to the hotel, and directed them to the place where the narcotics were to be delivered. From these facts the jury concluded, as it did, that Du Verney sold and concealed, or aided and abetted in the sale and concealment, of the narcotics, in violation of the Harrison Narcotic Act and the Jones-Miller Act. According to the further testimony of the Government agents, which the jury also believed, Lewis arranged the introduction of Agent Gross and Du Verney, delivered the package of narcotics, which he had received from Du Verney, to Agent Gross, and was paid $225.00 by Agent Gross for the narcotics, $25.00 of which he kept for himself, and $200.00 of which he later gave to Du Verney. The jury, of course, did not accept the fantastic story told by Lewis that the informer had given him the narcotics to deliver to Agent Gross, preferring

rather to believe the agents who testified that the informer was with them at that time. This unsatisfactory explanation of the possession of narcotics did not satisfy the jury, which properly found Lewis guilty of a violation of the Jones-Miller Act. Furthermore it is obvious that Lewis apparently acted as Du Verney's agent in the sale, making him equally liable as a principal, 18 U.S.C.A. 2, supra, and *Nye and Nissen v. United States,* supra, but whether as agent, or otherwise, he delivered the narcotics to Agent Gross, which delivery, apart from the sale itself, constituted a violation of the Harrison Narcotic Act. *Miller v. United States* (C.C.A. 7), 53 F. (2d) 316, 317. Accordingly, having found the appellants guilty of violating the Harrison Narcotic Act and the Jones-Miller Act, the jury, on the basis of the evidence which sustained these convictions, could properly conclude, as it did, that the appellants conspired to violate these Acts. The conversations of the appellants with the Government agents, the actions of the appellants, and the proven overt acts clearly established a conspiracy and the appellants' guilt thereof. That a party may be found guilty of a substantive offense because he aided and abetted in its commission and likewise be found guilty of conspiracy by committing the acts which also constitute aiding and abetting, is now an established rule of law requiring no further amplification or argument by appellee herein. *Nye and Nissen v. United States,* supra.

In arguing that the evidence is insufficient to sustain their conviction, appellants also contend that they

should have been acquitted because they were entrapped into the commission of the crimes. How the appellants can, on the one hand, deny that they engaged in the sale and concealment of narcotics, knowingly or otherwise, and, on the other hand, assert the defense of entrapment, is something as puzzling to the appellee now as it was when this illogical and unsupported theory was advanced during the course of the trial. As above indicated, in this language of the trial Court in its instruction to the jury, "A plea of that nature, that is of entrapment by an officer of the law only arises in a case where the defendant admits and does not deny the commission of the offense, and offers as an avoidance or excuse that he was enticed or entrapped into the commission of the offense by some officer of the law" (Tr. 332).

In concluding this phase of the argument, and in further support thereof, appellee now quotes from the testimony of Agent Gross, on direct examination, mention of which has heretofore been made and which, as above indicated, has been in substance corroborated by the testimony of other agents:

> "Q. When you were introduced to Mr. Lewis, what name did you give him?
>
> A. Paul.
>
> Q. What was said by you and Mr. Lewis?
>
> A. I said 'Hello'. He said 'Hello'. I stated, Cecil, I just got in from Chicago. Things got a little warm for me there so I came out here. I want to go into business and I need a connection.'
>
> Q. And did you tell him what kind of business?
>
> A. No, that—I believe that was understood.

Q. Go ahead. What else did you say?

A. I said, 'I heard that a man called Red DuVerney is a big connection here and I would like to meet him. Do you know him?'

Lewis said, 'Yes, I know him, but he doesn't come in very often. He comes in only when we have parties or dinners.'

I replied, 'I will sponsor a dinner; I will throw a dinner for tomorrow night. Will you invite DuVerney?'

Lewis said, 'I will call him tonight and have him here about nine o'clock tomorrow night.' " (Tr. 70).

* * * * * * *

"Q. Then what happened?

A. Shortly after 9:00 p.m. DuVerney entered the bar—the bar-room, sat down at the table and was introduced to the informer, Agent Milgannon and myself, by Cecil Lewis.

Q. And then what happened?

A. About ten minutes later after he—after I finished dinner, I called DuVerney over to the bar.

Q. Is the bar and the dining room in the same place?

A. It is right beside the table; they are all in the same room.

Q. I beg pardon?

A. They are all in the same room, the bar and the table we were sitting at. I called him over to the bar and I said, 'Red, I just got in from Chicago'——

Q. May I interrupt you for a minute? How was he introduced to you by Lewis? As Red DuVerney?

A. Red DuVerney.

Q. Go ahead.

A. I said, 'Red, I just got in from Chicago. I was putting down a little stuff in Chicago'—meaning I was selling narcotics—'and things got a little warm for me there, so I came out here to the coast. I am trying to find a connection, and I hear you are active. Can you do me any good?'

Q. What was said? Go on; just relate the conversation.

A. Red stated, 'I don't sell $10 papers. If you want an ounce, I can take care of you.'

Q. Anything said about the price of the ounce?

A. I said, 'What would an ounce go for?'

He said, '$600.' I said, 'I would like to buy a sample first before putting out that amount of money.'

DuVerney stated, 'I will sell you half an ounce as a sample for $300.'

I then replied, 'The price sounds all right. When and where will I get the stuff?'

DuVerney stated, 'Give me your phone number. Go on home and I will call you about 10:30.'

I gave DuVerney my phone number as Graystone 4-6192." (Tr. 72-73).

* * * * * * *

"Q. Did you get a phone call or did you make a phone call to either Lewis or DuVerney later that evening?

A. I received a phone call from DuVerney.

Q. And what was the phone call? What was said?

A. DuVerney called at about 10:30 and said, 'I am having a hard time getting the stuff; I'm a little busy; I will call you back later.' He said, 'I had a hard time getting your number. I had to call Cecil again to get the right one.'

I said, 'I gave Cecil my wrong number; I didn't have the phone very long, I'm sorry.'

Q. You hung up the phone then?

A. That is correct.

Q. Did you speak by phone either to Lewis or DuVerney that same evening or early the next morning?

A. I did.

Q. What was said and who called you?

A. DuVerney called at about 1:30 a.m.

Q. The morning of August 3?

A. That is correct.

Q. The dinner took place the evening before, August 2?

A. On the evening of the 2nd.

Q. What time was it the morning of August 3 that he called?

A. 1:30 a.m.

Q. What time?

A. 1:30 a.m.

Q. And what was said?

A. DuVerney said, 'Paul, I am ready to do business. Have the money ready, have the three hundred ready, and I will pick you up at your house in half an hour.'

Q. Did you give him the address?

A. I did. I said, 'That will be at 2 o'clock?' He said, 'That is right'. I said, 'My address is 920 Van Ness.' I said, 'I'll be there and I will have the money ready.'

Q. Did you tell him you would be out in front?

A. I said, I will meet you in front of my house.

Q. Then you hung up the phone?

A. That is correct.

Q. Did you see DuVerney early that morning after that phone call?

A. I did.

Q. Was anyone with you when you saw him?

A. Agent Milgannon was with me.

Q. And where were you when you saw DuVerney?

A. Agent Milgannon and I were standing in front of my house.

Q. At 920 Van Ness Avenue?

A. That is correct.

Q. Is that an apartment house?

A. It is.

Q. Did DuVerney walk up to you or did he drive up to you?

A. He drove up to me.

Q. What kind of a car was he in?

A. 1949 Cadillac." (Tr. 76-78).

* * * * * * *

"Q. What was that conversation?

A. I said, 'Red, I hope this is good stuff you are getting me as I don't want to pay out that amount of money for bad stuff.' He said, 'Don't worry; the stuff is powerful; it is 90 per cent pure. You can cut it as many times as you wish.'

Q. Go ahead. Did you discuss price again?

A. I said, 'How much will it be?' He said, 'I told you it will be $300.'

Q. For how much?

A. For a half ounce.

Q. Go ahead.

A. I said, 'Red, I only have $200.' He said, 'When I make a deal for three hundred, it is $300. When I make that deal, that goes.' He said, 'Now I will call my dago friend in North Beach. I will have to make a phone call.'

Q. That is what DuVerney said?

A. That is what DuVerney said.

Q. Go ahead.

A. We then drove to the Edison Hotel.

Q. By 'we' you mean DuVerney drove the car?

A. DuVerney drove the car and Agent Milgannon and I sat in the rear seat.

Q. Any other stop then other than that one in front of the beauty shop?

A. No.

Q. Did DuVerney get out of the car?

A. DuVerney got out of the car and instructed Agent Milgannon and I to remain in the car.

Q. How long was DuVerney away from you?

A. Approximately 45 minutes.

Q. Where did DuVerney go when he left?

A. The Edison Hotel.

Q. How long did he remain in the hotel, if you remember?

A. 45 minutes.

Q. Then what happened?

A. He came out of the Edison Hotel, walked to the car, entered the car, at which time he stated, 'You guys go on in to the lobby now and you will be taken care of.' I stated, 'I thought I was doing business with you. I don't like to do business with others.' DuVerney said, 'Never mind. Go on in to the hotel. My boy will take care of you.'

Q. Was the price discussed which you were to give to the man in the hotel?

A. It was.

Q. How much were you supposed to give?

A. 225.

Q. Was the word 'stuff' mentioned?

A. The word 'stuff' was mentioned, yes.

Q. By 'stuff' you meant what, in the parlance of narcotic peddlers?

A. It means narcotics.

Q. Does that mean heroin?

A. It can. Yes, it means heroin.

Q. Then you went into the hotel?

A. Well, I asked DuVerney when I could see him again.

Q. What did DuVerney say?

A. He said, 'You will have to get in touch with Cecil. Cecil will call me.'

Q. You got out of the car?

A. Agent Milgannon and I both got out of the car and walked into the lobby of the hotel.

Q. Now I notice you said $225. Did you question why the amount was $225 rather than $200?

A. No, I didn't. He quoted the price, and that was it.

Q. Do you know how many grains are in an ounce?

A. 437—437 and ½.

Q. All right. Go ahead. Did DuVerney drive away?

A. I don't know where DuVerney went.

Q. You and Milgannon entered the hotel?

A. That is correct.

Q. That is the Edison Hotel?

A. That is right.

Q. Then tell us what happened and who you saw.

A. We walked in the front door, and we were immediately approached by the defendant Lewis.

Q. Go ahead.

A. Lewis instructed Agent Milgannon to wait over to one side. He then had a conversation with me.

Q. All right. What was the conversation that Lewis had with you?

A. Lewis said, 'Paul, Red was in here a little while ago, and he gave me the stuff. He told me to give it to you and get $225.' He said, 'Red, he was a little afraid to do business with you and your friend because he doesn't you.'

Q. Go ahead.

A. He said, 'Have you got some money?' I said, 'I have the money.' 'Well,' he said, 'The stuff is up in my room. We will go up and get it.'

Q. Go ahead.

A. The defendant Lewis and I then entered the elevator at the Edison Hotel, proceeded to the sixth floor and entered Room 602.

Q. Did Milganon go with you?

A. No, he didn't; he remained in the lobby.

Q. Go ahead.

A. We went in Room 602. Cecil said, 'You are sure you have the money?' I said, 'I have.' I showed him the money. Lewis then handed me the package, a small white package in exchange for the $225 of government-advanced funds.'

Q. Did you give $225 to Lewis?

A. I did.

Q. He gave you the package?

A. That is correct.

Q. Was the package in an envelope?

A. It was wrapped in a piece of white paper folded in envelope fashion.

Q. Inside the white paper folded in envelope fashion was a white powder?

A. That is correct.

Q. Is this the envelope to which you refer that the powder was in (showing)?

A. It is. It bears my initials and the date.

Q. Now you received that from Lewis and it contained the powdery substance?

A. That is correct." (Tr. 80-84).

* * * * * * *

Rebuttal.

"Mr. Karesh. Q. Mr. Gross, when you left the Edison Hotel after the party on August 2nd, about what time did you say it was?

A. Approximately 10:15.

Q. And did this man that was referred to as Les leave with you?

A. He did.

Q. From the time you left the party until the time you met DuVerney in front of the hotel at two o'clock in the morning, was Les with you at all times?

A. He wasn't with me from the time I left my house with DuVerney until we got to the front of the Edison Hotel.

Q. No, what I mean, from the time you left the party until the time you met DuVerney at two o'clock in the morning; during that period of time was Les with you at all times?

A. He was.

Q. Was Agent Milgannon with you too?

A. He was." (Tr. 304-305).

To summarize, the jury believed the testimony of the officers that Du Verney, who made a hurried departure for Honolulu after a warrant for his arrest issued, arranged the narcotic transaction ultimately consummated by Lewis, and did not believe the contradictory denials of Du Verney and the fantastic story of Lewis that the informer gave him the narcotics for delivery to the Government Agent. Had the jury believed Du Verney and Lewis, they had no choice, as the trial

Court instructed, except to acquit, not on the ground that there was entrapment, which is a legal defense for the commission of crime, but that no crime whatsoever was committed. From all of this, the conclusion is likewise inevitable that the evidence overwhelmingly supports the verdict of the jury and negates the defense of entrapment as a matter of law.

V.

THERE IS NO REVERSIBLE ERROR IN THE RECORD, ASSUMING, ARGUENDO, THAT THERE IS ANY ERROR AT ALL.

Rule 52(a) of the Federal Rules of Criminal Procedure reads as follows:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Prior to the year 1919, the Federal Courts had held that any error was ground for reversal, unless the opposite party could affirmatively show that such error did not affect a substantial right of the complaining party. In 1919, Section 269 of the Judicial Code, 28 U.S.C.A. Sec. 391, was amended to read as follows:

> "On the hearing of any appeal, certiorari, writ of error or motion for new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Rule 52(a) of the Federal Rules of Criminal Procedure is, of course, a restatement of Title 28 U.S.C.A., Section 391, as amended.

One of the first interpretations of this amended Section 391 of Title 28 U.S.C.A. occurred in the case of *Haywood v. United States* (C.C.A. 7), 268 F. 795. In that case the Appellate Court, in passing upon the question of what constituted reversible error, stated, at page 798:

> "Before proceeding further, we think it right to emphasize the fact that a review by an appellate tribunal is not a requirement in affording a defendant the due process of law that is secured to him by the Constitution. In England writs of error in criminal cases are of comparatively recent origin. In our country, though writs of error within certain limitations have been allowed from the beginning, the grant has been of grace or expediency, not of constitutional demand.
>
> In the court of first instance the defendant is given his day in court, his trial by jury, his opportunity to confront opposing witnesses, and all other elements of due process of law. And if Congress might have withheld entirely the privilege of review, it is self-evident that Congress may at any time reduce the previously granted privilege. From recent legislation (40 Stat. pt. 1, p. 1181, Comp. St. Ann. Supp. 1919, Sec. 1246) we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that

> the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial."

A leading pronouncement of the Supreme Court upon this question is that found in the case of *Berger v. United States,* 295 U.S. 78. That case involved a conspiracy to utter false notes of a Federal Reserve Bank. The proof disclosed two conspiracies instead of one, in one of which conspiracies, the defendant Berger was not involved. The Court in passing upon the question of whether the variance amounted to such an error as constituted a prejudice to the substantial rights of the defendant, stated, after citing Section 269 of the Judicial Code hereinabove set forth:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not to be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. Bennett v. U. S., 227 U.S. 333, 338; Harrison v. U. S., 200 Fed. 662, 673; United States v. Willis, 36 F. (2d) 855, 856-857. Cf. Hanger v. United States, 285 U.S. 427, 431-433.

Evidently Congress intended by the amendment to Sec. 269 to put an end to the too rigid application sometimes made of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. See Haywood v. U. S., 268 Fed. 795, 798; Rich v. United States, 271 Fed. 566, 569-570."

See also

Kotteakos v. United States, 328 U.S. 750.

In our case at bar, therefore, it becomes necessary for the appellants to show that not only was error committed but that upon the record as a whole, such error is shown to affect the substantial rights of the appellants, and that the trial Court erred in overruling the motion of each appellant for a new trial. The appellants in their opening brief have not shown such to be the fact, nor does the record in this case support such a contention. In the first place, the errors, if any there be, are purely technical. In the second place, the appellants were obviously guilty of the crimes charged, as the overwhelming evidence against them showed, and the alleged errors obviously had not the slightest effect upon the jury in enabling its members to arrive at their verdicts.

The Appellate Courts give judgment after an examination of the entire record without regard to technical errors, defects or exceptions which would not affect the substantial rights of the parties, and when

and if any error is harmless, the judgment of the trial Court will not be disturbed. In this case, the evidence is so clearly convincing and conclusive that the appellants are guilty, that the jury could not reasonably have reached any other verdict, and, consequently, the appellants have not been deprived of any substantial rights and have no grounds for reversal.

CONCLUSION.

In *Graham v. United States,* 231 U.S. 474, 480, the Supreme Court said:

> "In the courts of the United States the judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth."

In denying appellants bail on appeal, the trial Court observed that these men were dangerous criminals who should not be at large (Tr. 33). Appellee, of course, does not ask this Honorable Court to affirm the judgments of conviction herein merely because the appellants are dangerous men. What appellee does respectfully urge is that where, as in our case at bar, vicious men have been convicted by clear and convincing evidence, after an eminently fair and impartial trial, they should not be released, perchance upon a technical error, to immediately once more menace society.

Accordingly, it is submitted that the appellants' convictions on all counts of the indictment should be affirmed.

Dated, San Francisco, California,
March 17, 1950.

Respectfully submitted,

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